UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

RAYMOND INTERIOR SYSTEMS

and Case 21-CA-37649

SOUTHERN CALIFORNIA PAINTERS
AND ALLIED TRADES DISTRICT
COUNCIL NO. 36, INTERNATIONAL
UNION OF PAINTERS AND ALLIED
TRADES, AFL-CIO

UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF
AMERICA, LOCAL UNION 1506

and Case 21-CB-14259

SOUTHERN CALIFORNIA PAINTERS
AND ALLIED TRADES DISTRICT
COUNCIL NO. 36, INTERNATIONAL
UNION OF PAINTERS AND ALLIED
TRADES, AFL-CIO

and

SOUTHWEST REGIONAL COUNCIL OF
CARPENTERS, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF
AMERICA
(Party in Interest)

ANSWERING BRIEF OF THE COUNSEL FOR THE GENERAL COUNSEL

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I. INTRODUCTION

Contrary to initial impressions, the facts of this case are fairly straightforward. The facts show that on October 1, 2006, Raymond Interior Systems (Respondent Employer or Raymond) and United Brotherhood of Carpenters and Joiners of America, Local 1506 (Respondent Union or Carpenters), (collectively called Respondents), took an historically separate unit of employees, the drywall finishers, and placed them into a larger Section 9(a) bargaining unit without affording them their Section 7 rights to choose their own bargaining representative (or no representative at all). Under long-established Board precedent, this was an unlawful accretion.

Compounding this conduct, Respondents then conducted a meeting of drywall-finishing employees on the following day. In that meeting, Raymond's two highest-ranking officials, CEO Travis Winsor and Superintendent Hector Zorrero told employees that if they did not sign with the Carpenters that day, they wouldn't be working anymore. Faced with this threat, some employees predictably signed Carpenters authorization cards, the Carpenters presented them to Raymond that afternoon, and the Respondents "renewed" their Section 9(a) relationship. At no relevant time did the Carpenters inform the drywall finishers of their *General Motors* and *Beck* rights.

Faced with these clear, yet unflattering facts, Respondents have embarked on a campaign of revisionism and hyperbole to deflect attention from a legitimate examination of their unlawful conduct. Although Raymond admitted during the investigation of the unfair labor practice charges that the drywall finishers were placed in the larger 9(a) unit, it now claims that this admission was "taken out of context" and in the "Legal Analysis" portion of its position statement. At the opening of the trial (and nearly fifteen months

after the first charges were filed), Respondents offered a secret "Confidential Settlement Agreement" to the Region and began claiming that it is, in fact, an exculpatory 8(f) collective-bargaining agreement, despite the obvious absences, among other things, of a bargaining-unit description or any terms and conditions of employment for the "unit employees." Next, Respondents mistakenly claim that the General Counsel's prosecution and the ALJ's decision are eviscerating Section 8(f) and decades of Board precedent, when the reality is that the General Counsel and the ALJ have correctly refused to extend the law so as to excuse Respondents from their unlawful actions. Finally, Respondents exaggerate the carefully-measured remedial obligations imposed upon them with overblown terms such as "forever," "life sentence," and "death sentence."

When all of the legal gymnastics and dramatic prose are removed, the inescapable conclusion remaining, and the one correctly reached by the Judge, is that Respondents have violated the Act as alleged, and they must assume the responsibility of remedying the harm they have caused to Raymond's employees.

II. UNCHALLENGED FINDINGS AND CONCLUSIONS THAT RESPONDENTS HAVE WAIVED

Under Section 102.46(b)(2) of the Rules and Regulations of the National Labor Relations Board (herein called the Board Rules), any exception to a ruling, finding, conclusion, or recommendation not specifically urged is deemed waived. The following findings and conclusions of the Judge are among those not specifically challenged by Respondents:

A. Unchallenged Findings Relevant to Respondents' Unlawful Accretion of the Drywall-Finishing Employees.

1. Unchallenged Findings Relevant to the Finding that the Drywall-Finishing Employees Constituted a Historically Separate Appropriate Bargaining Unit.[1]

- In practice, there remained a distinction between the work performed by Respondent [Employer]'s drywall finishing employees and those performing framing and drywall hanging. Thus, each of Respondent Raymond's former drywall finishing employees, who testified at the hearing, testified without contradiction that he or she never performed framing or drywall hanging work and that the employees, who performed drywall hanging work, never performed drywall finishing work. (ALJD 6:45-50)

- Hubel, who practiced as an attorney in the field of labor relations....[T]he parties stipulated that Respondent Raymond's bargaining relationship with the Painters Union has existed since, at least, 1966, covering [drywall-finishing] work for 20 years prior to the Carpenters Union's claim upon the work and the employees performing the work. Hubel, in fact, conceded that Respondent Raymond's drywall finishers constituted a historically separate bargaining unit from those employees represented by the Carpenters Union. (ALJD 9:28-36)

- [S]ince at least the 1960's, given the drywall finishing employees' status as an historical separate appropriate bargaining unit, clearly, a wall-to-wall unit, comprised of drywall framers and drywall finishers, is not the only appropriate unit herein, and the record evidence establishes that Respondent Raymond and Respondent Carpenters had historically excluded the former's drywall finishing employees from their master agreement bargaining unit. (ALJD 25:17-21)[2]

- [N]either [Respondent Raymond nor Respondent Carpenters] offered any evidence to establish that said historical unit [of drywall finishers] was no longer appropriate. Each, of course, has the burden of proof in this regard.[citation] In these circumstances, I reject the Respondents' contention and find that a unit of Respondent Raymond's drywall finishing employees constituted a historically separate and appropriate unit within the meaning of Section 9(a) of the Act.[3] (ALJD 25:41-43)

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[1] Respondent Carpenters purports to except to the Judge's finding and conclusion that the record evidence establishes that Respondent Raymond and Respondent Carpenters had historically excluded the former's drywall-finishing employees from their master agreement bargaining unit, citing ALJD 19-21. However, the Judge made no such finding in the cited portion of his decision.

[2] Only Respondent Raymond did not except to this finding.

[3] The Judge inadvertently found the unit was appropriate within the meaning of Section 9(a) instead of Section 9(b).

2. *Unchallenged Findings Relevant to the Finding that Respondents Unlawfully Applied the Carpenters Master Agreement to the Drywall Finishers on October 1, 2006, on a Section 9(a) Basis.*

- [A]ccording to [Raymond CEO Travis Winsor], between May 24 and September 12, 2006, two representatives of the Southwest Regional Council of Carpenters, Mike McCarron, the executive secretary, and Gordon Hubel, the contract administrator, "...expressed their intentions to fully enforce all provisions of their contract upon the expiration of the Painters Union contract...which could apply to [Raymond's] existing [drywall finishing employees]...." (ALJD 7:9-13)

- Gordon Hubel testified that...he told Winsor... "...we believed [our] contract kicked in immediately, that there wasn't any transition period...." (ALJD 7:18-20)

- In a position statement to Region 21, dated December 18, 2006, Respondent Raymond's attorney stated that the 2006-2010 Carpenters Union master agreement "...is a full-fledged Section 9(a) agreement, unlike the former agreement with the Painters, which was a Section 8(f) pre-hire agreement" and that "...pursuant to its Section 9(a) collective bargaining agreement with the Carpenters, which...covered drywall finishing work, Raymond complied with the requirements of that agreement and assigned the drywall finishing work to Carpenters." (ALJD 9:10-16)

- [A]ccording to Gordon Hubel, if Respondent Raymond had refused to assign the drywall finishing work to Respondent Carpenters, "...we would have argued the overall unit was a 9(a) unit." [H]e added, "I mean we were prepared to argue that there was one overall Section 9(a) unit." (ALJD 9:17-20)

- [I]n his December 18, 2006 position letter, Respondent Raymond's attorney argued that, "...the [October 2 meeting] was privileged by the fact that the [existing Carpenters Union 2006-2010 master agreement] covered the work and Raymond already recognized Carpenters as the Section 9(a) representative of its drywall employees (both hangers and finishers)." (ALJD 10:34-37)

- [At the October 2, 2006 meeting, Winsor spoke from a document that was distributed to employees], Respondent Raymond's Exhibit No. 1, reads, in part as follows:... "Raymond is bound by its labor agreement with the Carpenters and will apply this agreement to employees performing drywall finishing work in Southern California from October 1, 2006 forward." (ALJD 10:29 – 11:13)

- Winsor stated that the drywall finishing employees were paid for attending the October 2 meeting pursuant to the terms of the existing Carpenters Union master agreement. (ALJD 19:7-9)

- [T]he language of the Carpenters Union 2006-2010 master agreement clearly meets the requirements prerequisite for a Section 9(a) bargaining relationship between the contracting parties as set forth by the Board in *Staunton Fuel & Material*, 335 NLRB 717 (2001). Thus, the voluntary recognition agreement provision of the Carpenters Union 2006-2010 master agreement recites the Carpenters Union's demand for recognition, upon each contracting employer, including Respondent Raymond, as the majority representative of the bargaining unit employees; the Carpenters Union's show of, or offer to show, proof of majority support amongst the employees covered by the collective-bargaining agreement; and each contracting employer's, including Respondent Raymond, grant of recognition to the Carpenters Union as the "sole and exclusive" bargaining representative of its bargaining unit employees with the meaning of Section 9(a) of the Act. (ALJD 24:25-35)[4]

- The Judge's finding that *Central Soya Co.*, 281 NLRB 1308 (1986) was inapplicable to the facts of this case. (ALJD 25:31-26:8)

3. Unchallenged Findings that the Memorandum Agreement was Never Signed by Respondent Raymond.

- Gordon Hubel...admitted that Respondent Raymond has never executed a copy of the Memorandum Agreement. (ALJD 8:41-45)

- [T]here is no record evidence that Respondent Raymond ever actually entered into the Carpenters Union's so-called Memorandum Agreement. (ALJD 22:46-48)

4. Unchallenged Findings that the Confidential Settlement Agreement was Not a Lawful 8(f) Bargaining Agreement.

- Hubel conceded that the parties never discussed the confidential settlement agreement in terms of creating a Section 8(f) bargaining relationship. (ALJD 8:49-50)

- [Hubel] conceded that the document [confidential settlement agreement] does not contain a bargaining unit description or an expiration date, and...Winsor admitted that, during the discussions "we never used the term bargaining unit." (ALJD 9:1-3)

[4] Only Respondent Raymond did not except to this finding.

- I do not accept that the September 12 document [confidential settlement agreement] may be viewed as constituting a collective-bargaining agreement. (ALJD 29:7-8)

B. Unchallenged Findings Relevant to Respondents' Unlawful 9(a) Recognition Based on Coercion of the Drywall Finishers.

- I have found that, upon expiration of its collective-bargaining agreement with the Painters Union, pursuant to the terms of their September 12 confidential settlement agreement, Respondent Raymond and Respondent Carpenters unlawfully extended the coverage of their existing master agreement to include representation of the former's drywall finishing employees. Said collective bargaining agreement contains a common building and construction industry union-security provision .... The Board has long held that, in such circumstances, by entering into, maintaining, and enforcing a collective-bargaining agreement, which includes a union-security clause, an employer and labor organization engage in conduct violative of Section 8(a)(1) and (3) and Sections 8(b)(1)(A) and 8(b)(2) of the Act, respectively, and therefore, I find such violations in the instant matter. (ALJD 30:25-35)

- [T]here is no dispute, and I find that, on [October 2, 2006], subsequent to the formal presentations to the drywall finishing employees by representatives of Respondent Raymond and Respondent Carpenters during the meeting at the Orange facility, Respondent Carpenters distributed a form (General Counsel's Exhibit No. 3), which included a membership application and a representation authorization, to the said employees for completion and execution; that Respondent Carpenters collected signed copies of these forms; that later [that day] agents of the Carpenters Union demanded recognition by Respondent Raymond as the majority representative of the employees in the bargaining unit set forth in the Carpenters Union memorandum agreement, and as evidence of its majority status, permitted Travis Winsor to examine the authorization forms, which Respondent Carpenters had obtained earlier during the day, and that, after examining the authorization forms, Winsor entered into a recognition agreement, by which Respondent Raymond recognized Respondent Carpenters as the majority representative, within the meaning of Section 9(a) of the Act, of the latter's drywall framing and finishing employees. (ALJD 30:46-31:7)

- In these circumstances, I do not credit [Hector Zorrero's] specific denials of unlawful statements, which were attributed to him or to Winsor. (ALJD 32:21-23)[5]

- Given the circumstances, Winsor's and Zorrero's warnings obviously were heard by numerous employees and are virtually identical to those which the Board found unlawful in *Acme Tile*. (ALJD 33:8-10)

[5] Only Respondent Raymond did not except to this finding.

C. Unchallenged Findings Relevant to Respondent Carpenters' Failure to Inform Employees of Their *General Motors* and *Beck* Rights.

- Clerical employees of Respondent Carpenters...distributed copies of General Counsel's Exhibit No. 3....The document itself is in four parts, two being English and Spanish versions of Respondent Carpenters' application for membership form, the third a document entitled Supplemental Dues and CLIC Authorization, and the fourth being an English language Southwest Regional Council of Carpenters authorization for representation form. When Respondent Raymond employees completed and returned the entire document to the Respondent Carpenters representatives, the employees were given copies of the Carpenters Union magazine entitled *Carpenter*. (ALJD 11:35-12:3)

- There is no dispute that, during the meeting the Carpenters Union representatives failed to verbally inform the attending employees that each had a right not to join the Carpenters Union and continue working for Respondent Raymond, that each had the right to object to paying the portion of dues that went to non-representational expenditures, or that there was an internal Union procedure for employees to challenge the amount they would have to pay in dues. Finally, in these regards, close scrutiny of the Carpenters Union PowerPoint discloses that, while the obligation to pay dues is discussed in detail, there was nothing shown to the employees regarding the rights of nonmembers or regarding objecting to paying for union activities not germane to the labor organization's obligation as bargaining agent. (ALJD 12:38-46)

- [Melinda] Carlton [an office administrative assistant for Respondent Carpenters] confirmed that she would not give out a [*Carpenters*] magazine unless an employee returned signed paperwork [Carpenters membership application and supplemental dues check off forms]. (ALJD 22:4-5; 35:41-45)

- [A]long with a copy of the *Carpenters* magazine, Melinda Carlton handed each employee an envelope for the payment of dues. (ALJD 36:16-17)

- While there is record evidence that some employees signed membership applications for Respondent Carpenters subsequent to October 2, there is no evidence that any received the necessary *General Motors* and *Beck* notices before doing so. (ALJD 38: 42-44)

III. FACTS

A. Background.

1. The Employer's Operation.

Raymond is a specialty wall and ceiling contractor operating in several states, including in Southern California. Raymond primarily works on commercial projects, and performs, among other things, drywall framing and drywall hanging.[6] (Tr. 361-362) In October 2006, Travis Winsor was Raymond's President and Chief Executive Officer, and Hector Zorrero was its General Superintendent. (Tr. 360, 474-475) Winsor is also a licensed attorney. (Tr. 361)

In October 2006, Raymond had approximately 377 field employees working out of its Orange, California office. Of these 377 employees, approximately 224 performed drywall framing and hanging, and approximately 55 were drywall-finishing employees. (Tr. 361-362)

2. Bargaining History.

Since the 1960s, Raymond has engaged in collective bargaining through a multi-employer bargaining association, the Western Wall and Ceiling Contractors' Association (WWCCA), or it predecessor organizations. (Tr. 365-366) Winsor serves on the WWCCA's Executive Board, has spent time in each of its officer positions, and in September 2006, served as President of the WWCCA. (Tr. 366-367) Winsor has

[6] Throughout this brief, all citations to the transcript will be referred to as "Tr." followed by the appropriate page number(s). Citations to Judge Litvack's decision will be referred to as "ALJD" followed by the appropriate page and line numbers. General Counsel's exhibits will be referred to as "GCx," Respondent Employer's exhibits will be referred to as "REx," and Respondent Union's exhibits will be referred to as "RUx."

participated in contract negotiations between WWCCA and the Carpenters Union since around 2002, but did not participate in negotiations with the Painters Union. (Tr. 367-368, 372) In September 2006, Raymond was a party to collective-bargaining agreements with the Carpenters, the Painters and Allied Trades, the Plasterers, and the Plasterer Tenders. (Tr. 363).

It is undisputed that since approximately 1966, Raymond, through a multi-employer association, has been a party to successive collective-bargaining agreements with the Painters Union covering employees who perform drywall-finishing work. (Tr. 324-325) The most-recent collective-bargaining agreement between the Painters and Raymond is the Southern California Drywall Finishers Joint Agreement 2003-2006 ("The Painters Agreement"). (GCx 4, Tab 1) The Painters Agreement expired on September 30, 2006, and on that same date, Raymond lawfully withdrew recognition from the Painters for the drywall-finishing work. (GCx 4, Tab 1, Article 29; GCx 1(m) and 1(o) ¶¶ 11)

For many years, Raymond has also been a party to successive collective-bargaining agreements with the Carpenters covering, among other things, drywall framing and hanging. According to CEO Winsor and Carpenters Contract Administrator Gordon Hubel, beginning in 1988, drywall-finishing work was added to the Carpenters collective-bargaining agreement's scope of work. (Tr. 373, 573).[7] The most-recent collective-bargaining agreements are the 2002-2006 Southern California Drywall/Lathing Master Agreement ("2002 Carpenters Master Agreement"), and the 2006-2010 Southern California Drywall/Lathing Master Agreement ("2006 Carpenters Master Agreement"). (GCx 4, Tab 3; REx 4)

[7] Like Winsor, Hubel is also a licensed attorney. Hubel practiced labor law before working for the Carpenters. (Tr. 571-572)

Both the 2002 and 2006 Carpenters Master Agreements contain the following language:

VOLUNTARY RECOGNITION AGREEMENT

***

> (a) On behalf of each individual Contractor signatory hereto, the Association, having received from the Union a demand or request for recognition as the majority representative of the unit employees covered by this collective bargaining agreement; and having been presented, or having been offered to be presented with, by the Union, proof that the Union has the support of, or has received authorization to represent, a majority of the unit employees covered by this collective bargaining agreement; hereby expressly and unconditionally acknowledges and grant [grants], on behalf of itself and each of its members in their individual capacities, recognition to the Union as the sole and exclusive collective bargaining representative of the unit employees covered by this collective bargaining agreement, pursuant to Section 9(a) of the National Labor Relations Act, as amended, and agrees not to make any claim questioning or challenging the representative status of the Union. (REx 4, Article X, §7. Bracketed text is from the 2002 Carpenters Master Agreement.)

Although the Carpenters agreements purport to include drywall-finishing work, in practice, this work has historically been performed exclusively by employees represented by the Painters Union in a separate bargaining unit. (Tr. 600) Moreover, the drywall-finishing employees represented by the Painters did not perform drywall framing or drywall-hanging work, which was performed by employees represented by the Carpenters. (Tr. 86-88 (since at least 1978), 142-143, 192-194, 278-280)

In 2002, the following language was added to the Carpenters collective-bargaining agreement ("the Painters exception"):

WORK COVERED BY THIS AGREEMENT

***

> (f) ...The Union understands and recognizes that the WWCCA and its members are signatory to a collective bargaining agreement with the painters and/or plaster and plasterer tenders covering drywall finishing and wet wall finish work. The

parties agree that Article I, Section 6 [covering drywall-finishing work] shall apply only to those signatory employers who are not already signatory to a collective bargaining agreement with the painters and/or plasterers and plasterer tenders covering the drywall finishing or wet wall finish work as described above in Article I Section 6 of the agreement and who choose to assign that work to the painters. The Union agrees not to invoke or enforce Article I, Section 6 or to create any jurisdictional dispute concerning the work described in that section against any signatory employer that is also signatory to an agreement with the painters and/or plasterers and plasterer tenders covering the drywall finishing or wet wall finish work and who chooses to assign that work to the painters and/or plasterers and plasterer tenders. (GCx 4, Tab 3, Article I, Section 6(f))

In the 2006 Carpenters Master Agreement, this language was renumbered to Article 1, Section 7(g). The provisions of this section remained largely unchanged from the 2002 Carpenters Master Agreement, however, the phrase "as long as such contract remains in effect," was added at the end. (REx 4, Article I, Section 7(g))[8]

B. The Drywall-Finishing Employees are Put in the Carpenters Bargaining Unit.

Both Respondent Employer and Respondent Union admit that immediately upon the expiration of the Painters Agreement, the drywall-finishing employees were covered by the 2006 Carpenters Master Agreement under Section 9(a) of the Act. (Tr. 237, 576-579; GCx 1(o) and 1(p), ¶¶ 12, 15, 16, 17, and 22; GCx 4, p. 2-3)[9]

Moreover, in its position statement to the Region on December 18, 2006, Raymond admits that the 2006 Carpenters Master Agreement was a Section 9(a) agreement, and that it applied this contract to its drywall-finishing employees at the

[8] In his decision, the Judge incorrectly found that the "Painter's Exception" was added in 1992, and included the phrase "as long as such contract remains in effect." While the record evidence shows that the Painters Exception was added in 2002, and the final phrase appended in the 2006-2010 agreement, the General Counsel's position is that the Respondents could not in any event rely on contractual language to unlawfully accrete an historical unit of employees.

[9] Although GCx4 references Case 21-CA-37513, Respondent Employer requested the Region to consider its position statement in this case as well. See e-mail from Respondent Employer to the Region on March 23, 2007, in GCx5.

expiration of the Painters contract. (ALJD 9:10-16; GCx 4, p. 2-4) "Instead, the [October 2] meeting was privileged by the fact that Raymond's Carpenters Agreement covered this work and Raymond *already* recognized Carpenters as the Section 9(a) representative of its drywall employees (both hangers and finishers)" (Emphasis added). (ALJD 10:34-37; 23:11-17; GCx4, p. 5)

At the trial, and in response to a question about how the Carpenters became the bargaining representative of an overall unit that included the employees who had been historically represented by the Painters, Hubel testified, "Well, by operation of the contract. I mean we were prepared to argue that there was one overall 9(a) unit ...." (Tr. 601)

Later, Hubel added:

Q: Mr. Hubel, as of October 1, the Painters Agreement having expired September 30 and Raymond not having had its employee meeting yet, was Raymond free to repudiate the Carpenters Agreement?

A: I certainly would have argued that they couldn't.

Q: Based on what?

A: Well, if they tried to repudiate it, I guess at that point we would have argued the overall unit was a 9(a) unit.

***

Q: Do you know of any docu – any Agreement between Raymond and the Carpenters Union entered into in 2006 which specifically recites that the parties were entering into an 8(f) Agreement?

A: No.

(Tr. 642-643, 645)

C. Raymond and the Carpenters Purport to Enter Into Other Agreements Regarding the Drywall-Finishing Employees.

At trial, and for the first time, Respondents introduced two documents purporting to be collective-bargaining agreements covering the drywall-finishing employees.

1. The September 12 Confidential Settlement Agreement.

At trial, Respondents offered into evidence a Confidential Settlement Agreement, which they claim shows that they entered into an 8(f) collective-bargaining agreement covering the drywall-finishing employees. (REx 5; Tr. 34-35, 379, lines10-14, 655) The Confidential Settlement Agreement and Raymond's December 18, 2006 position statement were drafted by the same attorney. (GCx 4, page 7; Tr. 642) Although a putative collective-bargaining agreement, it was intended to be confidential from the unit employees. (Tr. 455)

The opening paragraph recites that "disputes and grievances" have arisen between Raymond and the Carpenters about the assignment of drywall work. In fact, it is undisputed that no grievance or lawsuit was ever filed over the assignment of this work. (Tr.382, 395)

In the Confidential Settlement Agreement, Raymond agrees to sign the Southern California Drywall/Lathing Memorandum Agreement 2006-2010 ("Memorandum Agreement"); however, there is no evidence that this Memorandum Agreement was ever executed. (REx 4; RUx5; Tr. 602) Raymond also agreed to apply the "Southern California Drywall Lathing Agreement" to "the fullest extent permitted by law" to its drywall-finishing work and employees upon the expiration of the Painters Agreement. Although the Confidential Settlement mentions both the Memorandum Agreement and

the 2006 Carpenters Master Agreement, it is unclear from the document's language which agreement was intended to be applied to the drywall finishers.

The Confidential Settlement Agreement does not include any provisions recognizing any labor organization as the exclusive bargaining representative of any unit of employees, does not discuss terms or conditions of employment, such as wages or hours, and it does not have an expiration date. (REx 5; Tr. 584) Centrally, the Confidential Settlement Agreement does not include a bargaining unit, as admitted by Hubel:

> Q: But [the Confidential Settlement Agreement] itself does not set forth a bargaining unit?
>
> A: Not these three pages. Well, I mean it does reference the [drywall finishers], but I wouldn't call that a definition in here. (Tr. 583-584)

And by Winsor:

> Q: Mr. Winsor, was there any discussion between you and anyone from the Carpenters as to what sort of Bargaining Unit you were talking about?
>
> A: We never used the term Bargaining Unit. (Tr. 399)

2. The Memorandum Agreement.

At trial, and also for the first time, Respondents produced the Memorandum Agreement, which purports to be evidence of a Section 8(f) collective-bargaining agreement, even though it recites that recognition is granted under Section 9 of the Act. (Tr. 612; RUx5, page 2, ¶ 7) The purpose of the Memorandum Agreement was to remove the Painters Exception from the 2006 Carpenters Master Agreement as it applied to Raymond. (Tr. 606-607) The Memorandum Agreement provides that, "This

Memorandum Agreement will be effective when signed ...." (RUx 5, page 3, ¶ 10); however, it was never signed. (RUx5; Tr. 602)

D. Raymond Calls a Meeting of the Drywall-Finishing Employees to Inform Them That They Will Now Work Under the Carpenters Agreement.

1. The Employees Arrive for the Meeting.

On the morning of Monday, October 2, 2006, Raymond and the Carpenters held a meeting at Raymond's Orange office for the drywall-finishing employees for the purpose of informing them that they were now covered by the 2006 Carpenters Master Agreement, and to explain the terms of that agreement to them. (Tr. 399-400) CEO Winsor and Superintendent Zorrero were among those present for Raymond (Tr. 401-402), and approximately five to eight representatives were present for the Carpenters. (Tr. 93, 147, 198, 238) Representatives from the Painters Union were excluded from the meeting. (Tr. 92, 198, 283, 442) The drywall-finishing employees entered Raymond's facility through a rear gate. (Tr. 179) After entering Raymond's facility, they were provided breakfast by the company. (Tr. 97 145, 196-197, 282, 407) The drywall-finishing employees were paid at the Carpenters' wage rate by Raymond for attending this meeting. (Tr. 204, 450)

2. Advance Preparations Are Made for Spanish-Speaking Employees.

CEO Winsor anticipated that there were a "fair number" of Spanish-speaking employees at the meeting. Raymond made arrangements to have headsets for these

employees, through which they could listen to a translation of the meeting. (Tr. 404-405, 503-504) The Carpenters provided the Spanish translator, who interpreted for both Raymond officials and the Carpenters. (Tr. 451, 562-563, 566-567) Just before the meeting was about to begin, the Spanish-speaking employees were called into the meeting room first, where they were given the headsets. (Tr. 404-405)

In addition to translating the spoken remarks at the meeting, Raymond and the Carpenters prepared Spanish versions of their PowerPoint presentations, (Tr. 173, 409-410, 554) and Raymond produced Spanish translations of its two handouts. (REx1; REx2) Further, the Carpenters had their membership application (though not their authorization cards) translated into Spanish (GCx3; Tr. 513-514), and had several representatives at the meeting for the purpose of explaining the Carpenters Agreement to Spanish-speaking employees. (Tr. 542, 545) According to Winsor, they "made every effort to make sure that all information was provided in both languages." (Tr. 405)

Finally, the Carpenters distributed copies of *Carpenter* magazine to employees who submitted applications for membership. (Tr. 503; 537) Although the Carpenters printed portions of this magazine in Spanish (RUx2, pp. 2, 6, 7, 8, 10, 22, 23, 29, and 31), they chose to print the *General Motors* and *Beck* notices only in English. (RUx2, p. 47; Tr. 502) The Spanish-speaking employees who testified about the meeting can read nothing, or almost nothing, in English. (Tr. 251, 297)

3. Employees are Told That They Must Immediately Join the Carpenters to Continue Working for Raymond.

At the beginning of the meeting, a flyer (printed in English and Spanish) that was drafted by Winsor was distributed to employees. (ALJD 10:29-31; REx1, Tr. 402, 403,

479) There was also a PowerPoint presentation going on while the presenters spoke. Both the Carpenters and Raymond made PowerPoint presentations (Tr. 477; REx 6; RUx 1)

Among other things, the Raymond flyer informed drywall-finishing employees that Raymond did not renew its contract with the Painters Union, and had begun applying the 2006 Carpenters Master Agreement to the finishers the previous day (October 1). (REx1) The flyer added that if they were not previously members of the Carpenters, the drywall finishers must join the Carpenters under the contract's union-security clause. (REx1)

Although Winsor did not discuss this specific document, he admitted that everything in the flyer was discussed during the meeting. (ALJD 18:8-10; Tr. 452-453, 470) The translator also recalled these topics, but could not remember Winsor's comments clearly.[10] (Tr. 568-570) Later in his testimony, however, Winsor hedged that he did not use the term "union-security provision" because he thought the employees might not know what that meant, but did convey that the employees had to join the Carpenters. (ALJD 18:20-21; Tr. 471-472)

Winsor and Superintendent Zorrero both testified that they told employees that all future finishing work was going to be performed by Carpenters, and that they would get workers from the Carpenters hiring hall if necessary. (ALJD 18:43-44, 19:44-20:3; Tr. 124-125, 432, 438-439, 471, 478, 591)

Four employees testified about what happened at the meeting. (Tr. 86, 141, 192, 278) One of these employees, Jose Ramos, listened to the meeting through the headset

[10] The translator also did not recall any discussion about resignation from the Painters Union, though there was abundant evidence that this topic was discussed. (Tr. 567; REx2; Tr. 128, 216, 472, 591-592) He also did not recall the specifics of the PowerPoint presentation, (Tr. 554) or any of the specific questions asked by employees during the meeting. (Tr. 555-558)

translation. (Tr. 302) The employees corroborate Winsor saying that Raymond no longer had a contract with the Painters, and that Raymond had already signed a contract with the Carpenters. (Tr. 94, 168, 199, 284-285) However, they all testified that Winsor's comments about the union-security clause were not as benign as he claims.

The employees testified that Winsor told them that all of the finishing work was going to be performed by Carpenters, and if they did not sign up with the Carpenters, they could no longer work for Raymond. (ALJD 32:29-33:8; Tr. 94, 119, 123, 151, 168-170, 176, 287, 293) Three employees testified that the employees became afraid of losing their jobs or were shouting (Tr. 97, 178, 223)

Winsor also claims he told employees that no one was being fired, but he wanted them to remain part of the workforce. (Tr. 421) Again, the employees generally agree with Winsor's testimony, but claim it was not so sanitized. Employee Richard Myers testified that Winsor told employees they "weren't fired, we just wouldn't have a job" (Tr. 97, 124) Through the interpreter, Jose Ramos did not hear Winsor say employees would be fired, but he did say that if they did not sign up with the Carpenters, they would not be working.[11] (ALJD 33:1-2; Tr. 316) When Winsor was asked if he explained how the contract's union-security clause fit into what he said about no one being fired, he responded by saying that was "a hard question to answer" because the contract's terms are not well understood by the employees. (Tr. 420-421) Winsor claims he told someone that they had eight days to make up their mind, but he could not recall who. (ALJD 19:48-50; Tr. 468) Without explanation, this 8-day deadline is not contained in Winsor's flyer that mentions the union-security clause. (Tr. 468; REx1).

[11] Although, through a translator, Mr. Ramos used the phrases "we wouldn't be working anymore" and "there wouldn't be any work," he regards them as semantically the same. (Tr. 304)

Employee Janet Pineda testified that Winsor told employees that they could not work the following day if they did not sign over with the Carpenters. (ALJD 14:35-15:1, 32:1-4; Tr. 176) Pineda's trial testimony was consistent with her pre-trial affidavit. (ALJD 15:34-37; Tr. 177) Although Pineda admitted that Winsor told employees they had plenty of time to decide (Tr. 177, 184), he had already told employees that if they did not sign up with the Carpenters, they could not work the next day. (Tr. 189) In fact, because he did not sign up to be a Carpenter, employee Jose Ramos did not report for work the following day in light of Winsor's statements. (ALJD 31:25-29; Tr. 316)

After the meeting, Myers testified that Winsor approached him individually. (ALJD 19:1-3; Tr. 99, 439) Winsor and Myers have known each other for a long time. (Tr. 439) Myers claims that Winsor asked him if he was going to sign up with the Carpenters. Winsor added that he would like Myers to sign up and stay with Raymond. (Tr. 99, 38) Winsor claims he does not recall the exact words that he said, but claims he did not ask Myers if Myers had signed up with the Carpenters. (Tr. 440)

In addition to CEO Winsor, there is evidence that similar threats were made by Superintendent Zorrero and representatives from the Carpenters Union. Employee Ruben Alvarez testified that Zorrero used almost the same words that Winsor did, and told employees that Raymond had already signed up with the Carpenters, and that to continue working for Raymond, they had to sign up with the Carpenters. (Tr. 200, 202, 219, 221). Like Winsor, Zorrero also told employees that there was no time to think about it – if they wanted to keep working, they had to sign up that day. (ALJD 32:16-23, 33:7-8; Tr. 223-224)

Employees Alvarez and Ramos both testified that a representative from the Carpenters told them that they had to sign up with Respondent Union to continue working with Raymond. (Tr. 202, 287) In response to employees' questions about whether they had to join the Carpenters immediately, the Carpenters' only response was that they did not care if the employees carried two union cards (i.e. the Painters and the Carpenters). (Tr. 429)

For their part, Winsor, Zorrero, and Hubel deny that the specific statements attributed to them and to their respective entities were made (Tr. 439-442, 448-449, 480-483, 589-591, 609)

4. Employees are Given Applications to Join the Carpenters.

At the conclusion of the presentation, representatives from the Carpenters Union began moving through the crowd to hand out paperwork. (Tr. 98) This paperwork included an application to join the Carpenters Union and an authorization card. (GCx3; Tr. 204, 290, 311-312) This combined application form/authorization card document was also available in the room adjoining the meeting room, where two representatives from the Carpenters had set up tables. (Tr. 499-501, 564-566, 595-596). Although the authorization-card portion of GCx3 is printed only in English, only one of the Carpenters representatives at the table spoke Spanish. (Tr. 499-501) Employee Jose Ramos testified that he received an application/authorization-card form, but he cannot read English and no one explained the form to him. (Tr. 313)

At the Carpenters' tables, there were copies of the January-March 2006 edition of *Carpenter* magazine from earlier that year. (RUx 2; Tr. 585) None of the employees recall seeing this magazine at the meeting that day, or being told to take one. (Tr. 103,

157, 205-206, 291) Although this magazine was at the meeting, employees were only given copies of it if they submitted an application for membership. (ALJD 22:4-5; 35:41-45; Tr. 503, 537) Employee Alvarez completed a membership application, but did not receive a magazine at the meeting, though one was mailed to his house about a week later. (Tr. 205-206) The Carpenters representatives were not instructed to direct anyone's attention to a particular part of the magazine. (Tr. 506) Although some parts of the magazine are printed in Spanish, there is no Spanish version of the magazine, and the Carpenters' *General Motors* and *Beck* notices are printed only in English. (RUx2, p. 47; Tr. 502)

The Union's PowerPoint slides include information about paying union dues (RUx1, p. 7), but do not mention employees' rights to become or remain a nonmember of the Union, or to object to paying for the Carpenters' nonrepresentational expenditures. (ALJD 12:38-46; RUx1)

All of the employees denied that any representative from the Carpenters told them that they have a right to be a nonmember of the Carpenters, that they have the right to object to paying the portions of dues for nonrepresentational expenditures; or that there was an internal union procedure to challenge the amount of dues they would have to pay. (ALJD 12:38-46; Tr. 103-104, 157-158, 206-208, 291-292) None of the employees heard the term "financial core" during the meeting. (Id.)

5. The Meeting Concludes.

At the conclusion of the meeting, employees had difficulty leaving because Raymond's gates were locked. (Tr. 99, 102, 131, 154; 203, 443) These were the same gates that the employees entered through (Tr. 179) At trial, Superintendent Zorrero did

not recall if Raymond's front door was locked, (Tr. 444) but admitted that the rear gate was locked. (Tr. 444) Because the gate was locked, employees could not get their cars out of Raymond's lot. (Tr. 102) There was nothing on the gate to alert employees that the gate would open if they drove up to it. (491-492)

The police arrived at Raymond's facility, and employees heard the responding police officers say that they had received a report that people were being held against their will. (Tr. 100-102, 155, 488) The police asked the employees if they felt like they were being held hostage. (Tr. 156) Raymond's gates were opened after the police left. (Tr. 156)

E. Raymond Recognizes the Carpenters as the Representative of the Drywall-Finishers a Second Time.

On the evening of October 2, 2006, representatives from the Carpenters presented Winsor with authorization cards gathered at the meetings that day.[12] (Tr. 445) All of the authorization cards were gathered that same day. (Tr. 634) Authorization cards were obtained only from drywall finishers, and not drywall hangers. (Tr. 598-599, 632) Winsor examined the authorization cards, and determined that a majority of the drywall-finishers had signed them. (Tr. 445-446) Based on those cards, Raymond executed "an additional voluntary recognition agreement with the Carpenters, again recognizing [them] as exclusive representative of Raymond's drywall finishing *and drywall hanging employees.* (GCx4, page 4 (emphasis added), and GCx4, tab 4) The Carpenters were recognized under Section 9(a) of the Act. (GCx4, tab 4)

[12] There was also a meeting at Raymond's San Diego office that day. (Tr. 445)

IV. ARGUMENT

A. Respondents' Belated Defenses Under Section 8(f) Should Be Rejected.

There is no credible evidence to support Respondents' belated claims that they had a Section 8(f) relationship at any relevant time. To the contrary, they argued for the opposite conclusion prior to the hearing.

1. Respondents Repeatedly Argued that They Had a Section 9(a) Relationship under the 2006-2010 Carpenters Master Agreement.

As the judge found, there is no dispute that at the expiration of the Painter's Agreement on September 30, 2006, Respondents immediately began applying the terms of the 2006-2010 Carpenters Master Agreement to Raymond's drywall-finishing employees. The Carpenters Master Agreement has language sufficient to independently establish a Section 9(a) relationship under *Staunton Fuel & Material, Inc.,* 335 NLRB 717, 717, 719-720 (2001). (ALJD 24:25-35) In fact, as found by the ALJ, Raymond's attorney argued to the Region in his December 18, 2006 position statement that the 2006-2010 Carpenters Master Agreement "...is a full-fledged Section 9(a) agreement, unlike the former agreement with the Painters, which was a Section 8(f) pre-hire agreement." (ALJD 9:10-14; GCx4, page 3)[13]

Counsel for Respondent Raymond admitted to the Region in his December 18, 2006 position statement that "on October 2...pursuant to its Section 9(a) collective bargaining agreement with the Carpenters...Raymond complied with the requirements of

[13] This statement is not only an admission that Raymond viewed the Carpenters Master Agreement as a Section 9(a) agreement, but that Raymond also appreciated the distinctions between Section 9(a) and Section 8(f) agreements.

that agreement and assigned the drywall finishing work to Carpenters," with the latter acting "...as the Section 9(a) representative of its drywall employees (both hangers and finishers)." (ALJD 23:11-18) Respondent Raymond reaffirmed this position in a March 23, 2007 e-mail to the Region. (GCx5)

Almost a year later, in their Answers to the Consolidated Complaint, filed on February 11 and 12, 2008, both Respondents claim that their conduct was privileged by their Section 9(a) agreement covering the drywall finishers effective on October 1, 2006. (GCx1(o) and 1(p), ¶12; ALJD 4:3-10). Also in their answers, Respondents claim that the only appropriate bargaining unit is the single, wall-to-wall unit described in the Carpenters Agreements. (GCx1(o) and 1(p), ¶10)

At the trial, Hubel testified that had Raymond tried to repudiate the Carpenters Agreement on October 1, 2006, the Carpenters "would have argued the overall unit was a 9(a) unit." (Tr. 642-643) Hubel also admitted that he was not aware of any agreement between Raymond and the Carpenters entered into in 2006 which specifically recites they were entering into an 8(f) agreement. (Tr. 645).

2. *Respondents Now Assert that the 2006-2010 Carpenters Master Agreement Was Entitled to a Section 8(f) Presumption.*

Notwithstanding their long history of arguing to the contrary, Respondents now claim that they created a separate 8(f) bargaining unit of drywall finishers under the 2006-2010 Carpenters Master Agreement. Respondents support their claims by distorting established Board decisions, including *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988); and *Comtel Systems Technology*, 305 NLRB 287 (1991).

The foundation of Respondents' argument is their reliance on the presumption that bargaining agreements in the construction industry are Section 8(f) agreements. *John Deklewa & Sons*, 282 NLRB 1375 (1987). Therefore, Respondents trust that the Board will give them the benefit of this presumption in spite of their long history of arguing to the contrary.

Building upon this base, Respondents claim that the Board's holding in *Comtel* allows them to apply a Section 9(a) collective-bargaining agreement with a single wall-to-wall bargaining unit to a historically separate group of Raymond's own employees on a Section 8(f) basis while at the same time allowing this same Section 9(a) agreement to continue to operate on a Section 9(a) basis for Raymond's remaining employees in the same wall-to-wall unit. In his decision, the ALJ correctly found that that Respondents' arguments "distort" the holding of *Comtel* and that case is factually distinguishable from the one now before the Board. (ALJD 28:7-14)

The Board's limited decision in *Comtel* held that in the construction industry, when a new employer joins a Section 9(a) multi-employer agreement, that new employer joins on a Section 8(f) basis until its employees demonstrate majority support for the union. The holding in *Comtel* is straightforward and strikes a practical balance between employee rights and industrial stability by allowing new construction-industry employers to join multi-employer agreements without employees having to first demonstrate support for the union. The employees' rights are protected by the safety valve provided by the Board's representation process.

Nothing in the *Comtel* decision, however, can be shaped into the result Respondents are seeking. Specifically, *Comtel* does not hold that a single employer can

apply a 9(a) multi-employer bargaining agreement with a single bargaining unit to individual job classifications of its own employees in that single bargaining unit on either an 8(f) or 9(a) basis. Contrary to Respondents' arguments, the General Counsel and the ALJ are not ignoring *Comtel's* mandate; that case simply does not apply to the facts of this case.[14]

Next, Respondent's claim that they are entitled to an 8(f) presumption under *Madison Industries*, 349 NLRB 1306 (2007) because the 2006-2010 Carpenters Master Agreement is ambiguous.

As an initial matter, *Madison Industries* did not overrule the Board's holding in *Staunton Fuel* that contract language alone can establish a Section 9(a) relationship. Rather, in *Madison*, the Board found that although the union requested and received recognition as the employees' "majority representative," the entire agreement was ambiguous because the employer gave up its right to an election and there was an 8-day grace period in the union-security clause. The Board found that these factors were consistent with an 8(f) agreement, and therefore, in the absence of extrinsic evidence showing a 9(a) agreement was intended, the 8(f) presumption had not been rebutted.

While Raymond also gives up its right to a Board election and there is an 8-day grace period in the Carpenters Master Agreement, the ambiguity found in *Madison* is not present here because there is no dispute that the Agreement's recognition clause recites that the Carpenters received recognition under Section 9(a) of the Act. Simply put,

[14] Also contrary to Respondent's assertions, the General Counsel is not disputing the settled principle that an accretion analysis does not apply in 8(f) situations. *IBEC Housing Corporation*, 245 NLRB 1282, 1282 (1979). Instead, the General Counsel is relying on Respondents' admissions that they had a Section 9(a) relationship.

neither of the Respondents can seriously argue that the words "Section 9(a)" somehow are confusing or ambiguous enough to be read "Section 8(f)."

Assuming for that sake of argument that the Board finds the Section 9(a) recital in the 2006-2010 Carpenters Agreement to be ambiguous, the reliable extrinsic evidence shows that Respondents intended a 9(a) relationship. As found by the ALJ, the parties' own admissions before and during the trial indicate that they viewed their relationship as a Section 9(a) relationship.

The purpose of the 8(f) presumption is not to allow parties to avoid liability when they later realize that their conduct is inconsistent with Section 9(a). Rather, the proper purpose of the presumption is to protect employees' representational rights when there is a legitimate dispute between the parties about whether an agreement is 8(f) or 9(a). But here, Raymond and the Carpenters have both claimed they have a 9(a) relationship, and thus, there is no dispute between them about their relationship.

Where both the parties' statements and conduct indicate that they intended to create a 9(a) relationship, and the language of their agreement creates a 9(a) relationship under Board law, there is no need for this 8(f) presumption. To allow Respondents the benefit of this presumption is not only contrary to their own statements and conduct, but as found by the ALJ, allows them to escape the consequences of a 9(a) relationship after they have been permitted to enjoy the benefits of that status.

3. *The Confidential Settlement Agreement Was Not an 8(f) Contract.*

Alternatively, Respondents claim that a three-page settlement agreement was, in fact, an 8(f) collective-bargaining agreement. This claim was rejected by the ALJ and should similarly be rejected by the Board.

As found by the Judge, the September 12 settlement agreement bears none of the hallmark signs of a collective-bargaining agreement. The settlement agreement does not contain any terms or conditions of employment: an essential part of any collective-bargaining agreement. *Madeline Chocolate Novelties, Inc.*, 333 NLRB 1312, 1312 (2001). Moreover, both Hubel's and Winsor's testimony supports the Judge's finding that the settlement agreement did not clearly set forth a bargaining unit. At trial, Hubel admitted that the settlement agreement did not include a bargaining unit, and Winsor admitted that the term "bargaining unit" was not discussed.

Another indicia showing that the Confidential Settlement Agreement was not a collective-bargaining agreement is that the settlement agreement was intended to be kept confidential from employees. However, employees have a right under both the Act and the LMRDA to copies of any collective-bargaining agreements which directly affect them. *Law Enforcement & Security Officers, Local 40B (South Jersey Detective Agency)*, 260 NLRB 419, 419 (1982); 29 U.S.C. § 414 (West 2009). Therefore, because established law provides that collective-bargaining agreements cannot be kept secret from employees, and because Respondents intended to keep their settlement agreement confidential from the drywall finishers, they could not have lawfully intended to create an 8(f) agreement through this document.

The most telling indicia, however, that the Confidential Settlement Agreement was not intended to be an 8(f) contract is that Respondents never mentioned it until the hearing opened. Although the same attorney for Raymond drafted both the Confidential Settlement Agreement and the December 18, 2006 position statement, there is no mention of the Confidential Settlement Agreement in the position statement. If the Respondents sincerely believed that they had intended to create a lawful 8(f) relationship in that agreement, why wouldn't they have raised it as a defense only 3 months after having signed it? Simply put, because Respondents' claim that the Confidential Settlement Agreement was intended to be a lawful 8(f) collective-bargaining agreement is an attempt to create an after-the-fact rationalization for their unlawful conduct.

4. The ALJ Properly Rejected Respondents' Claims and Found an Unlawful Accretion.

When all of Respondents' arguments are rejected, there remains only one inescapable conclusion: at the expiration of the Painters Agreement, Respondents unlawfully accreted the historically separate drywall finishers into the larger Carpenters 9(a) bargaining unit. Settled Board law creates a restrictive policy regarding accretions. For a proper accretion, the employees sought to be included into the bargaining unit must, (1) not have been historically excluded from the unit, and (2) the newly-created unit must be the only appropriate bargaining unit. *Teamsters Local 89 (United Parcel Service)*, 346 NLRB 484, 484 (2006); *Passavant Retirement & Health Center*, 313 NLRB 1216, 1218 (1994). This restrictive policy is maintained because the accreted employees are not accorded a self-determination election, and "the Board seeks to ensure the employees' rights to determine their own bargaining representative." *Passavant*, 313 NLRB at 1218.

a. There Was a Historical and Appropriate Unit of Drywall-Finishing Employees at Raymond for Decades.

It is undisputed that since 1966, Raymond, through a multi-employer association, has been a party to successive collective-bargaining agreements with the Painters Union covering employees who perform drywall-finishing work. Based on decades of prior collective-bargaining agreements and the long bargaining history between the Painters Union and Raymond, this bargaining unit of drywall-finishing employees is an appropriate unit for the purposes of collective bargaining. *Paramus Ford*, 351 NLRB 1019, 1024 (2007). "The party challenging an historical unit bears the burden of showing that the unit is no longer appropriate ...." "Compelling circumstances" are required to overcome the significance of bargaining history." See also, *Trident Seafoods, Inc.*, 318 NLRB 738, 738-739 (1995). Moreover, there is no evidence that a unit consisting of only drywall finishers is inappropriate under the Act; for example, there is no evidence that any of these employees are supervisors, guards, or confidential employees.

The evidentiary burden described above, coupled with Respondents' complete failure to present any evidence to the contrary, militates for a finding that the historical bargaining unit of drywall finishers at Raymond was an appropriate unit within the meaning of Section 9(b).

b. At the Expiration of the Painters Contract, Respondents Immediately and Unlawfully Accreted the Drywall-Finishing Employees into a Wall-to-Wall Carpenters Unit, and Deprived Them of Their Statutory Rights.

The evidence presented at trial leaves no doubt that Respondent Raymond and Respondent Carpenters, immediately upon the expiration of the Painters contract,

unlawfully accreted the drywall-finishing employees into the overall wall-to-wall Carpenters bargaining unit. In so doing, they deprived the drywall-finishing employees of their statutory right to select their own bargaining representative, and committed the precise sin the Board seeks to guard against in accretion situations.

Both Raymond's admissions in its position statement and the testimony of Hubel at trial show that the parties intended to establish a Section 9(a) relationship immediately upon the expiration of the Painters Agreement. Additionally, the parties' contract language meets the Board's requirements for a Section 9(a) relationship as set forth in *Staunton Fuel & Material, Inc.,* 335 NLRB at 717, 719-720 (2001). In fact, during the investigation, Raymond argued this position to the Region.

Respondents have accused the General Counsel of placing "form over substance" by holding them to the 9(a) relationship they created, instead of the 8(f) status they now want. However, what Respondents fail to appreciate is that in this case, the form of their 9(a) agreement *is* the substance. By creating a 9(a) relationship, Respondents chose the substantive rights and obligations that come with that status. Had they wanted the relative freedom of an 8(f) relationship, all they needed to do was create one.

Plainly, the parties understood the benefits conveyed by their choice to enter into a 9(a) relationship, as demonstrated by their legal training and by their responses when this recognition was being attacked. When the Painters Union filed unfair labor practice charges, Raymond responded by arguing that it had a 9(a) relationship with the Carpenters. Moreover, Hubel testified that if Raymond would have tried to take the finishing work away from the Carpenters, he would have argued against this because the parties had an overall 9(a) unit.

The employees and any other labor organization (including the Painters) were prevented from filing Board petitions by virtue of the employees' accretion into the overall Carpenters unit. It can be inferred, without doubt, that had a petition been filed, Raymond and the Carpenters would have defended against it by claiming that they had a 9(a) relationship.[15]

All of the evidence in this case shows, that between the time of the expiration of the Painters Agreement on September 30, and when the Carpenters presented authorization cards to Raymond on October 2, Raymond and the Carpenters considered the drywall-finishing employees to have been accreted into the Carpenters bargaining unit.[16] Because the drywall finishers had been both historically excluded, and because the *only* appropriate unit was not a wall-to-wall unit (as demonstrated by the finishers' long bargaining history as an independent unit), this attempted accretion fails. Consequently, the ALJ properly found, and in agreement with Respondents' earlier admissions, that on October 1, 2006, Respondent Employer violated Section 8(a)(1) and (2) by recognizing the Carpenters as the finishers' Section 9(a) representative, and Respondent Union violated Section 8(b)(1)(A) of the Act by accepting this recognition. As the contract contained a union-security clause, these parties also violated Section 8(a)(3) and 8(b)(2), respectively.

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[15] Seeing the flaws with this type of recognition, the Board's decision in *Dana Corp.*, 351 NLRB 434 (2007) would have eliminated this defense if the parties failed to post a notice of their Section 9(a) recognition, however the *Dana* decision is not retroactive.

[16] Raymond makes much of the ALJ's finding that the unlawful accretion occurred on October 1 while the complaint pleads "on or about October 2." First, October 1 is certainly within the scope of the phrase "on or about" which by its terms includes a variance of at least one day in either direction. Moreover, the complaint's allegations comport with the liberal standards of notice pleading. Additionally, October 1, 2006, was a Sunday, a non-work day for the drywall finishers, and precisely *when* an accretion occurs is intangible. However, the evidence clearly showed that between the time the Painters Agreement expired on September 30, and the drywall finishers meeting on October 2, Respondents had placed them under the 2006-2010 Carpenters Master Agreement, as shown in part by the drywall finishers being paid Carpenters wage rates for attending the meeting.

B. Respondents Have Failed to Meet Their Heavy Burden of Showing that the Judge's Credibility Determinations Were in Error.

In an attempt to avoid the consequences of Judge Litvack's decision and to substitute their own judgments for his, Respondents except to many of the Judge's findings and conclusions, particularly regarding Raymond's unlawful statements at the October 2 meeting, which were based on the credited testimony of Jose Ramos, Janet Pineda, and Ruben Mejia Alvarez. In support of their objections to many of the Judge's findings and conclusions, Respondents harp on minor testimony variances and cite to the discredited testimony of witnesses Travis Winsor and Hector Zorrero. However, Judge Litvack appropriately based his credibility resolutions upon review of the entire testimonial record and exhibits and his observations of the demeanor of the witnesses that testified. In fact, throughout his decision, the Judge explicitly states that his findings of fact regarding the unlawful statements made by Winsor and Zorrero were based upon, *inter alia*, his personal observations of witness demeanor. Respondents' witnesses were "contradictory," CEO Winsor's testimony was "adroitly labored and vague," he "appeared to be testifying particularly disingenuously," and his "demeanor, on the whole while testifying, was hardly that of a guileless witness." Superintendent Zorrero "failed to impress me as exhibiting any candor...particularly as compared to Alvarez." In contrast, the ALJ found the General Counsel's witnesses to be "the most trustworthy," "candid," "a veracious witness," "who, unlike others, clearly exhibited his comprehension of the meaning, gravity, and consequences of the oath...," (Ramos), "candid testimonial demeanor," "honest witnesses" (Pineda and Alvarez), and "compelling and frank

witness." (Alvarez). (See e.g. ALJD 2:29; 31:22-24; 31:29; 32:1; 32:7-9; 32:16: 32:17-20)[17]

The Board will not overturn credibility resolutions based upon demeanor unless the clear preponderance of the evidence convinces it that the decision is incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Likewise, as set forth by the Supreme Court, the process of discrediting all witnesses of one side does not impugn the integrity of the trier of fact. *NLRB v. Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949). In this case, Respondents have failed, both on the record and in their exceptions and briefs, to present reliable evidence, much less a preponderance of the evidence, to demonstrate that the Judge's credibility determinations were improper. Accordingly, Judge Litvack's findings and conclusions should stand.

C. The Judge Correctly Found that Respondent Union Failed to Properly Inform Employees of Their *General Motors* and *Beck* rights.

Upon consideration of all the record evidence, the Judge concluded that "there can be no doubt" that Respondent Carpenters failed to timely inform the drywall finishers of their *General Motors* and *Beck* rights. This conclusion should be affirmed by the Board.

1. Applicable Principles.

a. General Motors *Rights*

Over 40 years ago, the Supreme Court held that where continued employment is conditioned upon union membership, membership may be conditioned only upon the

[17] While Respondents except to the Judge's finding that none of the General Counsel's witnesses had any pecuniary, employment, or other interest in the outcome of this matter, they failed to present any contradictory evidence showing how any of the General Counsel's witnesses stand to gain anything from the outcome in this case.

payment of uniformly required dues and fees. Thus, "union membership" as a condition of employment is whittled down to its financial core. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

The Board applied the holding of *General Motors* in the companion cases *California Saw and Knife Works*, 320 NLRB 224 (1995), and *United Paperworkers International Union (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1995), and held that a union must provide all employees with notice of their rights under *General Motors* before the employees are subject to the obligations of a union-security clause. *Weyerhaeuser Paper Co.*, 320 NLRB at 350. A union that fails to provide employees notice of their *General Motors* rights, breaches its duty of fair representation owed to employees, and violates Section 8(b)(1)(A) of the Act.

In *California Saw*, the Board held that "basic considerations of fairness" obligate a union to notify newly-hired nonmember employees of their rights under *General Motors* at the time the union first seeks to obligate them to pay dues; otherwise, newly-hired employees might be misled into believing that full membership in the union is required as a condition of employment. Those same "basic considerations of fairness" also require unions to give notice to <u>all</u> full union members of their *General Motors* rights "to be certain that they have voluntarily chosen full [union] membership." *Weyerhaeuser Paper Co.*, 320 NLRB at 349. Stated differently, an employee is not a voluntary union member until after the union has informed him of his *General Motors* rights to be and remain a nonmember.

b. The Right to Object under CWA v. Beck

Respondent Carpenters violated Section 8(b)(1)(A) of the Act by failing to notify all employees of their rights to object to the payment of dues and fees for activities not germane to the Union's role as their collective-bargaining representative, under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). The Supreme Court in *Beck* stated that when an employee selects financial-core membership under *General Motors*, that employee is no longer obligated to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. *Beck*, 487 U.S. at 745. The Board has held that a union's duty of fair representation includes the obligation to notify, in writing, all bargaining unit employees of their *Beck* rights. *California Saw*, 320 NLRB 224, and *Weyerhaeuser Paper Co.*, 320 NLRB 349.

The Board defined in *California Saw* and *Weyerhaeuser* what a union is required to do to satisfy its statutory duty of fair representation with regard to notifying employees of their *Beck* rights. Specifically, a union must inform each employee that he has the right to be or remain a nonmember of the union, and that nonmembers have the right: (1) to object to paying for nonrepresentational activities and to obtain a reduction in fees for such nonrepresentational activities; (2) to be given sufficient information to enable them to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. If the employee chooses to object, that employee must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures. *California Saw*, 320 NLRB at 233.

To satisfy its duty, a union must give the above-described *Beck* notice to all newly-hired nonmember employees at the time it seeks to obligate them to pay dues, and

to all currently employed employee-members who have not previously received notice of their *Beck* rights. *California Saw*, 320 NLRB at 231; *Weyerhaeuser*, 320 NLRB at 350. Because employees must exercise their *General Motors* rights prior to objecting to nonrepresentational expenditures under *Beck*, a union's *Beck* notification logically requires a notice of *General Motors* rights as well.

2. *The Carpenters Failed to Properly Notify ALL Employees of Their* General Motors *and* Beck *rights.*

a. Respondent Failed to Timely Notify Employees of Their Rights

The sum of all the evidence presented at trial shows that the Carpenters breached their duty of fair representation owed to the drywall-finishing employees by failing to properly notify them of their *General Motors* and *Beck* rights. As an initial matter, it is undisputed that the Carpenters' only *General Motors* and *Beck* notices were contained in the C*arpenter* magazine; all of the employees testified, without contradiction, that no Carpenters official took any other steps to inform them of these rights.

Regarding the magazine, the employees also testified that none of them saw the magazine at the meeting, or were told to take one. This is also consistent with Respondent Carpenters' admission that employees were only given this magazine *after* they submitted an application for membership. Of course, Respondent Carpenters' duty is to fairly represent *all* of the unit employees, and not just members. The Carpenters were obligated to inform all of the unit employees of their *General Motors* and *Beck* rights so the employees would have sufficient information to intelligently decide for themselves whether to exercise those rights. Here, however, Respondent Carpenters made the

decision for the employees, by informing them of their rights to be nonmembers only after they were required to submit an application for that very membership.

Moreover, the notice provided in the magazine was untimely. Representatives of both Raymond and the Carpenters had already told employees that if they did not join the Carpenters, they could no longer work for Raymond. These unlawful statements were compounded by the fact that employees were not simultaneously given notice of their *General Motors* and *Beck* rights, which notice is required whenever a union-security clause is enforced against employees. Even assuming, for the sake of argument, that the Board credits Respondents' accounts that they told employees they had 8 days to join the Carpenters, Respondent Union has still failed to properly and timely notify employees of their rights because it has admitted that only *members* received copies of the magazine that contained the notice, and not all unit employees, as required under Board law.

Respondent Union argues that some employees continued to work past the stated 8-day deadline without consequence, and therefore no violation may be found. This argument should be rejected. Even if Respondent Union's version of the facts is accepted – that it told employees they had 8 days to join the Carpenters – there is no evidence that Respondent Union sent *General Motors* or *Beck* notices to all of the unit employees by the end of this 8-day period, or told employees that the contract's union-security clause would not be enforced. Therefore, under either scenario, Respondent Union has failed to satisfy its legal duty to the drywall-finishing employees.

b. *The Carpenters'* General Motors *and* Beck *Notices Were Inadequate*

Because the Judge found that the Carpenters did not give the required *General Motors* and *Beck* notices, he did not reach the issue of whether Respondent Union's notices were sufficient. In the unlikely event the Board finds the Carpenters did give employees notice of their rights, the Board should still find that these notices were inadequate.

Respondent Union's *General Motors* and *Beck* notices were inadequate under Board law because they were hidden in a months-old magazine, and thus, were not reasonably calculated to inform employees of their rights. Respondent Union argues that under *California Saw*, a union is permitted to publish its *GM/Beck* notices in an annual newsletter without mention of that fact in the newsletter's table of contents. *California Saw*, 320 NLRB at 234-235. However, the facts of this case are distinguishable from those in *California Saw*.

In *California Saw*, the Board found that the union's *GM/Beck* posting in its annual December newsletter was lawful. In that case, as in this case, the notice is not referenced on the newsletter/magazine's cover. However, in *California Saw*, the Board found that the notice was sufficient because it was printed in a distinct color, with the word "Notice" in bold writing at the top of the page, and because the newsletter was only 12 pages long in newspaper format, "[it] was apparent even from a cursory review." *California Saw*, 320 NLRB at 234. In that case, the Board held, "This is not a case where a union's publication notice of its *Beck* policy is hidden in a lengthy publication such that, without a cover notation, a nonmember employee making any reasonable perusal of the publication would likely not be alerted to the *Beck* policy." *Id.* at 234.

However, in this case, the Carpenters' notice does not include any attention-grabbing description, or simple statement such as: "Notice," or "Important Information." Its title runs on for two lines in legalistic language: "Procedures for Objecting Non-Members to File with the Union Objections to the Expenditure of Dues for Purposes Not Germane to Collective Bargaining." In fact, from the title of this notice, it ostensibly appears only to apply to nonmembers – it does nothing to alert employees that there is a prerequisite right to become a nonmember in the first place.

In finding the notice in *California Saw* to be lawful, the Board relied, in part, on the union's non-discriminatory distribution of its newsletter. In finding that notice lawful, the Board stated, "Nor is there any basis for deeming [the union's] publication notice discriminatory; the same notices are sent to all represented employees, regardless of membership." *California Saw*, 320 NLRB at 234-235. Of course in this case, Respondent Union *did* discriminate when distributing its magazine because it admits that employees were only given a copy after they submitted an application for membership. The Carpenters' discriminatory policy undermines any argument that they fulfilled their duty of fair representation to all bargaining unit employees.

A further distinguishing feature is that the *Carpenter* magazine is much longer than the 12-page newspaper format found lawful in *California Saw*. The magazine distributed by Respondent Union is fifty pages long, and the *GM/Beck* notice appears on page 47 – buried behind four full pages of obituaries and in front of a picture of a worker and advertisements for a turtleneck shirt and work boots. Although Respondent Union claims that the notice is lawfully highlighted in a different color, the entire magazine is printed in color, which hardly makes the colored notice prominent. Of course, the

Carpenters could easily remedy this problem by alerting employees to the published notice; however, it is undisputed that the magazine does not direct employees' attention to any particular part of the magazine, let alone the *GM/Beck* notices.

Also, in *California Saw*, the union published its notice in the December issue and gave employees a window period to exercise their rights in January, or within 30 days of hire. *California Saw*, 320 NLRB at 279. Here, in October 2006, the Carpenters gave employees a magazine dated January – March 2006. Therefore, on its face, this magazine was between 6 and 9 months out of date. Combined with the admitted complete lack of guidance from Respondent Union, no reasonable employee could have appreciated the significance of receiving this stale magazine.

The Board explicitly stated that a union could violate its duty of fair representation under these circumstances. "We accordingly fully agree with Member Cohen that a publication notice may violate the duty of fair representation if the circumstances establish that the notice is not reasonably calculated to apprise the nonmember employees of *Beck* rights." *California Saw*, 320 NLRB at 234, fn 55. Thus rather than granting a license to unions to publish their *GM/Beck* notice in any manner, the Board cautioned that published notices must still evidence a reasonable effort to inform employees of their rights. There is no such evidence in this case.

In sum, and unlike the notice provided in *California Saw*, the Carpenters' *GM/Beck* notice in this case would not be obvious to any employee making a reasonable perusal of the magazine, and it was distributed under a discriminatory policy. Accordingly, Respondent Union's notice is ineffective and, thus unlawful under Section 8(b)(1)(A).

c. *Respondent Union Failed to Provide* General Motors *or* Beck *Notices to Spanish-Speaking Employees*

Further, the evidence shows that Respondent Union failed to inform many employees of their rights by omitting Spanish-language *General Motors* and *Beck* notices from its magazine. Although the Board does not require *GM/Beck* notices to be in any particular form, a union must make reasonable efforts to notify employees of their rights. *Weyerhaeuser Paper Co.*, 320 NLRB at 350.

Under the facts of this case, the parties' own conduct shows what they consider to be "reasonable efforts" to communicate with the employees, and that Respondent Union failed to make these reasonable efforts when it came to notifying employees of their *General Motors* and *Beck* rights.

Here, there is abundant evidence that both Respondents made advance preparations to accommodate a significant number of Spanish-speaking employees. Raymond provided headsets so employees could listen to a Spanish translation of the speakers' comments. Raymond also provided Spanish versions of: (1) Winsor's flyer distributed to employees; (2) its form about resignation from the Painters Union; and (3) its PowerPoint presentation. Respondent Union printed its membership application (though not the authorization cards) in Spanish, supplied a Spanish version of its PowerPoint presentation, and provided several of its representatives to translate employees' questions, including the translator for the meeting. Most tellingly, portions of the magazine containing the *GM/Beck* notices were printed in Spanish.

Under any reasonable interpretation of these facts, Respondent Union cannot claim that its failure to provide the required notices in Spanish was inadvertent or satisfied its duty of fair representation to Spanish-speaking employees. Rather, the facts

show that Respondent Union failed to take the requisite "reasonable efforts" required under Board law, and thus, violated Section 8(b)(1)(A) of the Act.

D. The Remedies Recommended by the Judge are Proper and Consistent with Established Board Precedent.

Having been found in violation of the law, Respondents claim that the Judge's recommended remedies are punitive and unsupported by Board law, by using phrases such as "forever," "life sentence," and "death sentence." As outlined below, Respondents' claims are alarmist hyperbole.

Respondents have misread the Judge's order to provide that they are "forever" barred from entering into an 8(f) relationship again. In fact, either of Respondents is free to enter into any 8(f) relationship anytime they wish – just not with each other. More particularly, Respondents are not "forever" barred from entering into an 8(f) relationship with each other; the Judge simply ruled – consistent with established Board law – that their *next* recognition must be sanctioned by the Board's certification process. Should such a certification occur, the Judge's order would not prevent a subsequent 8(f) agreement between the parties should the appropriate circumstances arise.

Moreover, the remedy recommended by the Judge is well-supported by Board law, most recently by the Board's decision in *Garner/Morrison, LLC*, 353 NLRB No. 78 (January 27, 2009). After finding that the construction-industry employer in that case unlawfully recognized the union, the Board ordered that the employer withdraw and withhold *all* recognition from the union unless and until the union was duly certified by the Board. *Garner/Morrison*, 353 NLRB No. 78, slip op. at 7.

Another Board decision casts doubt on the ability of Respondents to revert to an 8(f) relationship after a failed 9(a) agreement. In *Clock Electric, Inc.*, 338 NLRB 806 (2003), the Board found that an electrical contractor had unlawfully recognized a union as the majority representative of its employees (a Section 9(a) recognition). In that case, the Board also ordered the employer to withhold recognition from the union until it was certified following a Board-conducted election – there was no finding that the employer and union could revert back to some "core 8(f)" bargaining relationship. *Clock Electric, Inc.*, 338 NLRB at 808.

Respondents argue that even if the Board sustains the Judge's finding that the October 2 recognition was the product of unlawful coercion, that would not invalidate their earlier October 1 "accretion" recognition, citing *Zidell Explorations, Inc.*, 175 NLRB 887 (1969) for the proposition that subsequent unfair labor practices do not invalidate an 8(f) agreement. However, such a ruling would require the Board to find that the Respondents had a lawful Section 8(f) agreement before the October 2 meeting, which is contrary to both the Judge's findings and the record evidence, including Respondents' own admissions.

Finally, Respondents argue that they should not be required to reimburse employees for dues deducted under the union-security clause. The Carpenters claim that this remedy in excess of what is required for *General Motors* and *Beck* violations and Raymond claims that if should not be jointly and severally liable with the Carpenters. Both claims should be rejected by the Board.

While Respondent Union is correct that under a traditional remedy for *GM/Beck* violations, employees are given the opportunity to retroactively resign and object, the

Carpenters unlawful conduct in this case goes much further. The remedy ordered by the Judge was meant not only to cure the *GM/Beck* violations, but the unlawful recognition violations as well. Therefore, because the Respondents' bargaining relationship covering the drywall finishers was unlawful *ab initio*, any dues collected under their agreement's union-security clause were also collected unlawfully, and must be refunded to make the employees whole.

Additionally, it is entirely consistent with established Board law to hold the offending employer jointly and severally responsible with the offending union to reimburse employees for unlawfully deducted dues. *Sweater Bee by Banff, Ltd.*, 197 NLRB 805, 806 (1972).

V. CONCLUSION

The Board should adopt Judge Litvack's findings that the Respondents could not lawfully accrete the drywall-finishing employees into a Section 9(a) wall-to-wall Carpenters bargaining unit. Respondents' actions were unlawful because the drywall-finishers had historically been a separate bargaining unit for decades, and had been represented by another union. This long bargaining history demonstrates that a wall-to-wall unit is not the *only* appropriate unit at Respondent Employer. Based on these factors, the accretion of the drywall finishers deprived them of their Section 7 rights, and was therefore unlawful.

Moreover, Respondents may not deny that unlawful assistance occurred where all of the credible evidence shows that employees were coerced into joining the Carpenters

as a condition of continued employment, and where Respondent Union accepted recognition from Raymond on this basis.

In addition, Respondent Union has failed to notify all of the bargaining unit employees of their *General Motors* and *Beck* rights. The Carpenters failed to provide all employees with copies of its notices because it admittedly only gave notices to employees after they completed an application for membership. Further, the notices it did provide were poorly identified and buried in an out-of-date magazine. Respondent Union made no effort to direct employees' attention to these notices. Finally, the Carpenters failed to provide *General Motors* and *Beck* notices in Spanish, even though they knew that many of the bargaining unit employees did not understand English.

Based on these showings, the General Counsel respectfully urges the Board to reject the arguments in Respondents' exceptions, to adopt the ALJ's findings that Respondent Employer violated Section 8(a)(1), (2), and (3) and Respondent Union violated Section 8(b)(1)(A) and (2) of the Act, as alleged, and to order that Respondents fully comply with the Judge's recommended remedy.

Respectfully submitted,

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Dated this 9th day of February, 2009.

STATEMENT OF SERVICE

I hereby certify that our office contacted the following parties by telephone on the 10th day of February, 2009. We informed each party in this case that the Answering Brief of the Counsel for the General Counsel had been submitted by E-Filing to the Executive Secretary of the Board and that each party would be served with a copy of the same documents by e-mail.

I hereby certify that copies of the Answering Brief of the Counsel for the General Counsel were served by e-mail, on the 10th day of February 2009, on the following parties:

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